THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

August 21, 1975

The Honorable N. Alex Bickley
City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

Open Records Decision No. 109

Re: Availability under the Open Records Act of building plans from a city's building permit files.

Dear Mr. Bickley:

You have requested our opinion regarding the availability under the Open Records Act, article 6252-17a, V.T.C.S., of building plans from a city's building permit files. You state that these plans, prepared by professional architects and engineers for private construction on private property, must be submitted as part of an application for a building permit.

Subject to certain exceptions, the Open Records Act makes available to the public all information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business. You have not stated which, if any, of the exceptions of section 3 of article 6252-17a you believe are applicable in the present instance.

Section 3(a)(4) excepts "information which, if released, would give advantage to competitors or bidders. . ." In Open Records Decision No. 75 (1975), we stated:

> We do not believe this exception applies when the competition or bidding on a particular contract has been completed, and the contract is in effect.

In our opinion, this rationale is applicable to the filing of building plans, since the very act of submission to the city would seem to imply an operative contract between the builder and his client.

Section 3(a)(10) excepts "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In Open Records Decision No. 50 (1974), we held that engineering drawings of mobile home tie-down anchors "would clearly qualify as trade secrets, if they have been kept confidential by the manufacturers using them." The cases cited in support of this propostion, however, as well as the definition of "trade secret" from the Restatement of Torts on which they are based, deal with "machines" or "devices." Furthermore, in Attorney General Opinion H-258 (1974), we stated that Section 3(a)(10) probably does not exempt from disclosure any information not already exempt under section 3(a)(1), which excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Since we have discovered no case holding that architectural and engineering drawings of "buildings" may qualify as trade secrets, it is our opinion that the exception of section 3(a)(10) is not strictly applicable here.

Section 3(a)(1) may, however, itself except particular building plans filed with the city, based upon the common law doctrine of copyright. If the plans have been statutorily copyrighted pursuant to federal law, of course, they are protected and would in such case be open to public inspection but not to copying. In most instances, however, architectural and engineering plans will not have been formally copyrighted.

Common law copyright exists only in an "unpublished work." Its protection is automatic and perpetual from the moment the work is created. It may be terminated by compliance with the formal requisites of federal copyright law or by a "general publication." Edgar H. Wood and Associates, Inc. v. Skene, 197 N.E. 2d 886, 892 (Mass. 1964). The doctrine of common law copyright has been recognized in Texas. Gilmore v. Sammons, 269 S.W. 861 (Tex. Civ. App. -- Dallas 1925, writ ref'd); Vernon Abstract Co. v. Waggoner Title Co. 107 S.W. 919 (Tex. Civ. App. 1908). Furthermore, its protection clearly extends to architectural plans. Edgar H. Wood & Associates, Inc. v. Skene, supra; Shaw v. Williamsville Manor Inc., 330 N.Y.S. 2d 623 (N.Y. 1972); Smith v. Paul, 345 P. 2d 546 (Cal. Dist. App. 1959).

The courts are in agreement that "publication" is tantamount to surrender of the protection of common law copyright only if such publication is "general," i.e., "such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property." American Tobacco Co. v. Werckmeister, 207 U.S. 284,

299-300 (1907). The great weight of authority is that the filing of architectural plans with a public authority does not constitute a general publication so as to divest an owner of his common law copyright protection. Smith v. Paul, supra; Jones v. Spindel, 196 S.E. 2d 22 (Ga. App. 1973); Krahmer v. Luing, 317 A. 2d 96 (N. J. Super. 1974); Shaw v. Williamsville Manor, Inc., supra; Edgar H. Wood and Associates, Inc. v. Skene, supra; Ashworth v. Glover, 433 P. 2d 315 (Utah 1967). Contra, De Silva Construction Corp. v. Herrald, 213 F. Supp. 184 (M. D. Fla. 1962); Turney v. Little, 186 N. Y. S. 2d 94 (N. Y. Sup. Ct. 1959); Wright v. Eisle, 83 N. Y. S. 887 (N. Y. Sup., App. Div. 1903) (followed in Turney v. Little, supra, but holding expressly rejected in Shaw v. Williamsville Manor, Inc., supra). The most instructive of these cases for our purposes is Edgar H. Wood & Associates, Inc. v. Skene, supra, which discussed the availability of publicly filed architectural plans in terms of the Massachusetts Open Records Act. The Court stated that, although the Act granted the public the right to inspect and copy such plans for the limited purpose of protecting itself against unsafe construction, it could not be construed to authorize architectural plagiarism, and should not be extended to permit the making of "copies which will impair the architect's common law copyright and property in the plans.". Id. at 894.

Common law copyright may also be waived by a public exhibition of a completed structure to such a degree that it constitutes general publication. Although most courts have held that the viewing of a building by a limited number of persons does not result in a loss of common law copyright, see e.g., Smith v. Paul, supra, the degree of public exhibition required for waiver is a question of fact. Read v. Turner, 48 Cal. Rptr. 919 (Cal. Dist. App. 1966). Professor Nimmer suggests as a standard that

> . . . no publication based on construction should be held to occur unless members of the public obtain a possessory interest in the completed structure. That is, if a building is publicly offered for sale or rent, this would constitute a publication of the building - - and to the extent it is a derivative work - - also of the architectural plans. Nimmer on Copyright, § 57. s, at 223.

The question also arises as to whom is entitled to assert a common law copyright. Again, a factual determination is required, based upon the ownership of the plans at the time of their submission. For example, if the architect or engineer is acting as a mere employee, ownership of the plans, and the concomitant right to claim a common law copyright therein, vests in his employer. If, on the other hand, the architect or engineer is acting in the capacity of independent contractor, he normally retains ownership of the plans and is as a result the only person entitled to assert a common law copyright claim. Ablah v. Eyman, 365 P. 2d 181 (Kan. 1961); cf., Williams v. Weisser, 78 Cal. Rptr. 542 (Cal.Dist. App. 1969).

In summary, it is our opinion that all information pertaining to construction specifications and submitted to a public body as a requirement for obtaining a building permit is public. If the actual drawings are determined not to be public, and the relevant information is not available from any other source, it should be extracted and furnished to a requestor.

Whether the plans themselves are public is a question of fact. If they have been statutorily copyrighted, they are open to public inspection but not to copying in accordance with the federal copyright laws. If they have not been statutorily copyrighted, they may have the protection of common law copyright, provided the completed structure has not been publicly offered for sale or rent or has otherwise been so publicly exhibited as to constitute a general publication. In addition, a common law copyright must be asserted in order to qualify for the exception of the Open Records Act, and it may be asserted only by the owner of the plans. Such ownership is also a fact question whose answer depends upon the terms of the contract between the architect or engineer and his client. The governmental body with which the plans are filed should resolve each of these factual inquiries before it determines whether to permit the inspection and copying of building plans.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee